STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KOREN NIGEL MOSS,

Defendant-Appellant.

UNPUBLISHED
August 3, 2001

No. 214688
Wayne Circuit Court
Criminal Division
LC No. 95-02302-FC

Before: K.F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM

After his first trial ended in a hung jury, defendant was retried and a jury convicted him of carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to four to fifteen years' concurrent imprisonment for the carjacking and armed robbery convictions, and a consecutive two-year term of the felony-firearm conviction. Defendant appeals as of right raising a number of issues. We affirm in all respects.

I. Speedy Trial

First, defendant contends that he was denied the right to a speedy trial by the nearly twenty-two month delay before his retrial. We do not agree. To preserve a speedy trial issue for appellate review, "[a] defendant must make a `formal demand on the record.'" *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). A review of the record in the instant case does not reveal that defendant made such a formal request and thus is not properly preserved for our review. Even if properly before us, the record fails to support defendant's claim. During most of the period of delay, defendant was not confined, but rather, was out on bond. Defendant asserts he was prejudiced by his inability to locate certain witnesses. However, trial counsel disclosed that she knew that the missing witnesses were incarcerated, and therefore, knew that their presence could have been secured. Consequently, even if this issue was properly preserved, we would conclude that defendant was not prejudiced by the delay. See *People v Gilmore*, 222 Mich App 442, 460-462; 564 NW2d 158 (1997).

II. Instructions on Lineup Procedure

Next, defendant argues that the trial court abused its discretion by overruling his objection to a police officer's testimony concerning the circumstances surrounding the victim's attendance at a pretrial lineup identification. On direct examination the officer testified the instructions he gave to the victim before the lineup were as follows:

> *Q. Mr. McClorey [prosecutor]*: Okay. What happens then when [the victim] drives down and checks into . . . the 1st Precinct?
>
> *A. Officer Riccinto*: I came upstairs and I instructed him on what the line-up was going to entail. It's basically like you see on T.V. You're going to go into a room that has a one way glass. There will be people that are – the person or persons that are the target of the investigation will be behind that people (sic), along with other people and you will actually look. They can hear you, but they cannot see you. You can get real close to the window to take a look at these people and I instruct them just look at the person's face. Don't look at their clothing because inmates change clothes.
>
> They change hairstyles, *but your mind always takes the instant Polaroid in a traumatic experience*, so I tell my people, just look at the face and if you see – [emphasis added.]

This court reviews issues pertaining to the admissibility of evidence for an abuse of discretion. *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000). An abuse of discretion obtains were "an unprejudiced person, considering the facts on which the trial court acted or would conclude that there was no justification or excuse for the ruling made." *Id*.

In the case at bar, the trial court overruled the objection on the ground that the officer's response was merely a description of what he told the victim when the victim appeared to view the line-up. Defendant contends that the trial court's failure to strike the officer's statement as unresponsive unfairly bolsters the victim's ultimate identification. A review of the statement within the context of entire record does not lead us to the same conclusion. The trial court's decision relative to the statement was not so "palpably and grossly violative of fact and logic that it evidence[d] not the exercise of will but the perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Safeco Ins Co v Panzer*, 235 Mich App 226, 229; 596 NW2d 238 (1999). Accordingly, we find no error.

III. Prior Inconsistent Statement

Defendant further argues that the trial court committed error requiring reversal by not permitting defense counsel to use an allegedly prior inconsistent statement for impeachment purposes. We disagree.

At trial, defense counsel sought to elicit a statement from Officer Lang that the victim did not tell her that defendant possessed a weapon when he gave his initial statement to the police:

> *Q. Ms. Sager* [*attorney for defendant*]: What did he [Mr. Prime] tell you happened?
>
> *A. Officer Lang*: I have to refer to my paperwork. He told me he was about to enter his vehicle when he was approached by two black males. Number one is the perpetrator that had the gun. He told Mr. Prime to give me your money and your wallet and lay on the ground.
>
> * * *
>
> *Q*. And number one, the six foot light complected dark hood perpetrator told him – told Mr. Prime to give me your money, wallet and lay on the ground?
>
> *A*: That's correct.
>
> *Q*. And that's the perpetrator that had the gun.
>
> *A*. That's correct.
>
> * * *
>
> *Q*. Okay. *Mr. Prime did not tell you that perpetrator number two had a weapon at any time, did he*? [Emphasis added.]
>
> *A*. No he did not.
>
> *Mr. McClorey*: Objection. At this point I think we're starting to get into potential impeachment by the negative.
>
> *The Court*: That's sustained.

A trial court's decision to admit or deny evidence will not be disturbed absent an abuse of discretion. *Schutte, supra* at 715.

MRE 613(b) governs the use of prior inconsistent statements and provides in pertinent part that:

> [e]xtrinsic evidence of a prior inconsistent statement *by a witness* is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon . . . . [Emphasis added.]

Indeed, a witness may be questioned on prior statements made by that witness. See MRE 613(a); see also *People v Avant*, 235 Mich App 499, 510-511; 597 NW2d 864 (1999). Officer Lang, however, is not the witness that allegedly made a prior inconsistent statement.

Here, it was the victim that allegedly made the prior inconsistent statement. As such, the only proper witness to impeach with the statement is the victim. Therefore, according to the dictates of MRE 613(b), it is not appropriate to elicit an allegedly prior inconsistent statement from a third party witness; in this instance, the police officer.

Counsel may not explore the inconsistency beforehand and thereby anticipitorily impeach a witness that has not yet testified. Consequently, we find that the trial court did not abuse its discretion by sustaining the prosecutor's objection and disallowing any further response to the questions as posed by defense counsel.

IV. Sufficiency of the Evidence

Next, defendant submits that the evidence adduced at trial was insufficient to sustain his convictions for carjacking, armed robbery, and felony firearm thus violating his fourteenth amendment right to due process. We do not agree.

To determine whether sufficient evidence was introduced at trial to support a conviction, this Court "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999). We consider each in turn.

A. Carjacking

To be convicted of carjacking, the prosecutor must prove:

> (1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that

> person, a passenger, or any other person in lawful possession of the motor vehicle and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting another in fear. *People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998); MCL 750.529a(1).

In the instant case, the victim unequivocally testified that as he was walking from his car to his apartment, defendant and another unidentified individual approached him, held a gun up under his neck and demanded all of his money. At this time, defendant and the other perpetrator began to search the victim's pockets and took the keys to his car. According to the victim's testimony, the unidentified perpetrator was the individual initially brandishing the weapon. However, when defendant could not unhook the club locked onto the steering wheel of the victim's car, the unidentified perpetrator then handed the gun to the defendant while he unlocked it. Both the unidentified perpetrator and defendant took the victim's wallet and all of his money. Thereafter defendant ordered the victim to lay on the ground. The victim testified that he was indeed frightened.

Defendant contends that the evidence is insufficient because the victim's testimony is "highly contradictory." Even if the victim's testimony was contradicted, that is not an issue of sufficiency of the evidence, but rather, an issue of credibility. Indeed, "[q]uestions of credibility are left to the trier of fact and will not be resolved anew by this Court." *Avant, supra* at 506. This evidence was sufficient for a rational trier of fact to find that the "essential elements of the crime were proved beyond a reasonable doubt." *Nelson, supra* at 459.

B. Armed Robbery

Similarly, the prosecution presented sufficient evidence to prove that defendant committed an armed robbery beyond a reasonable doubt. The elements of an armed robbery are: "(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citations omitted.)

The victim's testimony alone establishes that defendant along with another unidentified individual approached the victim, brandished a gun, and took all of the victim's money by physically reaching into his pockets. Considering the evidence in a light most favorable to the prosecution reveals that a rational trier of fact could have found each and every element beyond a reasonable doubt. We do not find error in this regard.

C. Felony Firearm

Finally, the prosecution presented sufficient evidence to prove defendant's felony firearm conviction beyond a reasonable doubt. *Carines, supra* at 757. MCL 750.227b(1) provides that "[a] person who carries or has in his . . . possession a firearm, when he . . . commits or attempts to commit a felony . . . is guilty of a felony." *People v Burgenmeye*r, 461 Mich 431, 436; 606 NW2d 645 (2000).

A review of the victim's testimony reveals that defendant came into possession of the firearm when the unidentified perpetrator attempted to unlock the club on the steering wheel of the victim's vehicle. Bearing in mind that issues of credibility lay solely within the province of the trier of fact, on the record, we find sufficient evidence to permit a rational trier of fact to conclude that defendant possessed a firearm when he participated in the robbery and carjacking. Accordingly, we do not find error in this regard.

V. Ineffective Assistance of Counsel

A. Trial Counsel

A claim for the ineffective assistance of trial counsel should be raised by an evidentiary hearing or by motion for a new trial. *People v Snider*, 239 Mich App 393; 608 NW2d 502 (2000). Since defendant did not sufficiently develop the lower court record on this issue, our review is limited to the existing record. *Id*.

To prevail on a claim for the ineffective assistance of counsel, defendant must establish that "his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial" and that but for the deficiency, the fact finder would not have convicted the defendant. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted); see also, *Snider, supra* at 424. Additionally, defendant must defeat the presumption that counsel's conduct was a matter of sound trial strategy ever respectful that trial counsel is not required to pursue a meritless position. See *Barrow v Pritchard*, 235 Mich App 478, 483; 597 NW2d 853 (1999); see also *Snider, supra* at 425.

In the case at bar, defendant argues that trial counsel failed to object to the suggestive line-up and subsequent in-court identification and that counsel's failure to do so was prejudicial and denied him his right to a fair trial. We do not agree.

This Court will not review issues relative to identification procedures not raised at trial unless manifest injustice would result by our refusal to do so. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1999). A review of the record indicates that no manifest injustice flowed from the victim's in-court identification. The testimony adduced at trial revealed that the crime occurred in a well lit area. Further, the victim

testified that when the two individuals initially approached him, defendant stood approximately two or three feet away. However, when the perpetrators began rifling through his pockets, the victim testified that defendant was "right up on" him. According to the victim's testimony at trial, his vision was not obstructed at any time during the encounter thus permitting him to observe defendant's face at a closer distance.

On cross examination, defense counsel had an adequate opportunity to dissect the victim's testimony relative to the circumstances surrounding the victim's identification and thus assail not only his recollection of events that transpired over three years prior, but also impugn his credibility. Moreover, on appeal, defendant himself referenced the numerous inconsistencies in the victim's description of his assailant thus providing the fertile ground in which defense counsel, through cross-examination, planted the seed of doubt. As the *Whitfield* Court observed, "[i]f there were any reason to question the accuracy of [the victim's] identification . . . it was placed before the jury, which gave the testimony its due weight." *Whitfield, supra* at 351. Our review of the record does not demonstrate that trial counsel's failure to object in this regard would have secured a different outcome. For these reasons, trial counsel's failure to object did not deprive defendant of a fair trial.

B. Appellate Counsel

Defendant also claims the ineffective assistance of appellate counsel for counsel's failure to raise issues concerning hearsay testimony, evidence allegedly erroneously admitted at trial pertaining to defendant's prior bad acts, and issues pertaining to the line-up procedure and subsequent in-court identification.

Appellate counsel's "failure to raise every claim of arguable legal merit" does not amount to ineffective assistance. *People v Bulger*, 462 Mich 495, 573; 614 NW2d 103 (2000) (citing *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995)). Indeed, "[d]efining ineffective assistance of appellate counsel as the failure to raise any arguable claim would impair the independence of the profession." *Reed, supra* at 382. Counsel functioning in an appellate capacity is however, expected to "raise those claims that might arguably have merit." *Bulger, supra* at 573. A review of appellate counsel's brief establishes that counsel did in fact raise arguably meritorious claims. Accordingly, we find that appellate counsel's conduct was not so deficient so as to set forth a viable claim for ineffective assistance.

VI. The Line-Up

Defendant argues that the line-up was unduly suggestive thereby impugning the integrity of the victim's in-court identification. Again, we do not agree.

The constitution condemns pretrial identification procedures which are so unduly suggestive so as to give rise to a substantial likelihood of irreparable misidentification. See *People v Vaughn*, 200 Mich App 611, 620; 505 NW2d 41 (1993) (discussing due

process concerns as regards lineup procedures.) Due process however, does not necessarily require police to create a lineup of individuals whose physical characteristics precisely match defendant's. *Id* at 620. Indeed, individual differences among the participants "are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the lineup." *Id*. Actual differences in physical characteristics do not automatically rise to the level of "impermissible suggestiveness." *Id.*

In the case at bar, a review of the totality of the circumstances surrounding the lineup and the victim's identification therein does not reveal that the lineup was so "unnecessarily suggestive" as to deprive defendant of his constitutional right to due process. Defendant challenges the pretrial lineup on the grounds that police contacted the victim regarding the lineup and further indicated that an individual was indeed arrested in conjunction with the crime. Even if the police informed the victim that his attacker would appear in the lineup, that is not sufficiently prejudicial to create an error of constitutional proportions. See *People v Larry*, 162 Mich App 142, 155; 412 NW2d 674 (1987) (stating "[w]e cannot find that the fact that the complainant was told her attacker would be in the line-up is prejudicial.")

Further, defendant argues that when the victim appeared to view the lineup, he was placed into a room where police officers were present and actively discussing the carjacking, armed robbery and the lineup. On this basis, defendant submits that the lineup was impermissibly suggestive. A review of the victim's testimony at trial belies defendant's position. The victim testified that when police asked him to come in to view a lineup, at no time did any of the officers suggest who they arrested in connection with the offense or otherwise advise the victim who to select out of the lineup. Moreover, two attorneys were present at the lineup and presumably ensured that the lineup itself was not constructed in such a manner as to impermissibly funnel the victim's attention toward defendant. After viewing the lineup, the victim quickly identified defendant as one of the perpetrators. As discussed prior, at the time of the incident, the victim had the opportunity to obtain an unobstructed view of defendant's face at a close proximity.

Upon review of the totality of the circumstances, we cannot find that the pretrial lineup procedure was so unnecessarily suggestive so as to taint the victim's identification and subsequent in-court identification. Accordingly, we do not find a "substantial likelihood of irreparable misidentification" necessary to constitute a violation of defendant's constitutional right to due process of law.

VII. Statement Against Penal Interest

Next, defendant argues that the trial court committed error requiring reversal when it declined to permit a witness to testify as to an exculpatory statement made to another third person by the individuals that were allegedly responsible for the crime and were incarcerated for an unrelated murder. The declarant was not present to testify at trial and finding no exceptions to the rule against hearsay, the trial court refused to allow the

testimony. This Court reviews decisions to admit or deny evidence for an abuse of discretion. *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000).

During the trial, defense counsel wanted Latara Young to testify to a statement that a man named Gerald Jordan made to her concerning another statement made to him by the individuals that *actually* committed the crime. Defense counsel proffered the testimony as a statement against penal interest which is a recognized exception to the rule against hearsay. MRE 804(b)(3) provides that:

> A statement which was at the time of its making so far contrary to the *declarant's* pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. [Emphasis added.]

The situation in the instant case presents a classic case of double hearsay. The first level of hearsay is the inculpatory statements allegedly made by the individuals that actually perpetrated the crime to Gerald Jordan. The second level of hearsay is the statement by Gerald Jordan relaying those inculpatory statements to Latara Young. Defense counsel sought to admit those inculpatory statements through Latara Young's testimony.

Hearsay within hearsay cannot be admitted unless each of the statements satisfy a viable exception to the rule against hearsay. *People v Hawkins*, 114 Mich App 714, 719; 319 NW2d 644 (1982). For the proffered statement in the case at bar to be admitted, there must be at least two applicable exceptions. On the record here before us, we are unable to find any exception to the hearsay rule that would allow the proffered statement to come into evidence. Consequently, we find that the trial court did not abuse its discretion by ruling that the statement was inadmissible hearsay[1].

VIII. Evidence of Prior Bad Acts

Finally, defendant argues that testimony elicited from him during the prosecutor's cross-examination regarding his prior criminal record was inadmissible character

[1] We note here that the trial court engaged in a lengthy discussion regarding the lack of corroborating circumstances surrounding the statement purportedly against penal interest. The trial court ultimately ruled that the testimony was inadmissible largely because of this deficiency. In our analysis, we find that the statement is inadmissible because it is not a statement truly against penal interest. On its face, the statement does not tend to subject Gerald Jordan, the declarant, to any criminal culpability. Even though the trial court took a different path, it ultimately reached the correct conclusion. Indeed, it is axiomatic that this Court will not "reverse the trial court's decision if the right result is reached for the wrong reason." *Schellenberg v Rochester Elks*, 228 Mich App 20, 47; 577 NW2d 163 (1998).

evidence as defined by MRE 404(b). We do not agree. Decisions to admit or deny evidence are reviewed by this Court for an abuse of discretion. *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000).

In the case at bar, defendant elected to take the stand in his own defense when the trial court represented that it would not permit evidence concerning his prior criminal record. On cross examination, the following colloquy between the prosecutor and defendant transpired:

> *Q. Mr. McClorey*: There are several ways to get a set of wheels, aren't there?
>
> *A. Defendant*: Yeah, if you buy it.
>
> *Q*. You can buy it. That's one way. You can steal it, too, can't you?
>
> *A*. No, you can't. *I don't steal*. [Emphasis added.]

At this time, counsel approached the bench wherein the prosecutor argued that defendant's statement that he "doesn't steal" was a statement that placed his reputation, character and prior conduct directly at issue. The prosecutor argued that defendant opened the door for evidence concerning his prior convictions[2] for impeachment purposes. On the contrary, defense counsel argued that it was defendant's understanding when he decided to take the stand in his own defense that evidence concerning his prior convictions would be excluded. Further, defense counsel argued that had defendant known that evidence concerning his prior record would be introduced, he would have elected to remain silent. The trial court permitted the prosecutor to introduce only one of defendant's prior convictions for impeachment purposes[3].

Defendant contends that he was "goaded" into providing the unsolicited, extraneous statement. We disagree. Evidence of a defendant's prior criminal record is prejudicial to the extent that it invites the jury to misuse the prior conviction evidence and focus upon the defendant's general bad character. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999) (citing *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988)). However, "when a defendant seeks to controvert the truth-seeking functions of a criminal trial, the introduction of otherwise inadmissible evidence is permissible to contradict his false testimony." *People v Williams*, 93 Mich App 236, 242; 287 NW2d

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[2] Defendant has a Wayne County conviction for attempt receiving and concealing stolen property and a prior conviction in Oakland County for receiving and concealing stolen property in contravention of MCL 750.535.

[3] The trial court indicated that both convictions were relevant but required the prosecutor to refer to only one. The trial court stated that it did not have "a legal reason" underlying its decision. However, presumably, the trial court, in the exercise of its sole discretion, elected to exclude one of the two albeit relevant prior convictions so as not to unduly prejudice defendant and thus invite the jury to consider the prior convictions as evidence of defendant's general bad character. We note that the trial court did not abuse its discretion in this regard.

184 (1978). Once defendant represented that he didn't steal, defendant opened the door for the prosecutor to introduce evidence to the contrary. Indeed, evidence of defendant's prior conviction was not offered as substantive evidence, but rather "to negate defendant's express contention" that he doesn't steal. See *Williams*, *supra* at 240.

Moreover, to ensure that the jury did not use the prior conviction as improper character evidence in violation of MRE 404b, or for any other improper purpose, the trial court specifically instructed the jury that they could consider the prior conviction only to assess defendant's credibility. Accordingly, we find that the trial court did not abuse its discretion by permitting the prosecutor to impeach defendant's credibility with defendant's prior conviction.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper